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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1539

MORGAN P. KOERNER AND JUANITA B. KOERNER, WHO SUE INDIVIDUALLY AND AS CLASS REPRESENTATIVES OF ALL MEMBERS OF THE WEST VIRGINIA DEPARTMENT OF PUBLIC SAFETY AND THEIR SPOUSES,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Morgan P. Koerner and Juanita B. Koerner, on behalf of themselves and all other members of the West Virginia Department of Public Safety and their spouses, petition for a writ of certiorari to review the judgment of The United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The findings of fact and opinion of the district court (App. A, pp 1A-11A are reported in 404 F. Supp 1128 (S.D. W. Va. 1975). The opinion of the Court of Appeals (App. C, pp, 14A-17A) is reported in ——— F. 2d ——— (No. 76-1495, decided February 28, 1977).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Are noncompensatory cash subsistence payments made to members of the West Virginia Department of Public Safety for the convenience of their employer excludable from their gross income for income tax purposes under Section 119 of the Internal Revenue Code of 1954 (26 U.S.C.)?

2. Is this action a proper vehicle for a class action? If so, did the respondent waive lack of notice to amend this action to a class action?

STATUTES, REGULATIONS AND RULES INVOLVED

The relevant provisions of Section 119 of the Internal Revenue Code of 1954 (26 U.S.C.) and Section 1.119-1 of Treasury Regulations on Income Tax (26 C.F.R.) are set forth in Appendix D, pp. 18A-19A, and the relevant provisions of Rule 23 of the Federal Rules of Civil Procedure are set forth in Appendix E, pp. 20A-21A.

STATEMENT OF THE CASE

Petitioners, Morgan P. Koerner and Juanita B. Koerner, his wife, and the class they represent, brought this action to recover federal income taxes and assessed interest for the years 1967, 1968 and 1969. Juanita B. Koerner is a party to this action solely as a result of filing joint tax returns for the years in question (App. A, p. 1A).

The original complaint was filed only on behalf of Koerner and his wife, to which the government filed a timely answer. On April 16, 1973, the late Sidney L. Christie, Judge of this Court, entered an order permitting the Koerners to amend the complaint "so as to make this a class action as well as an individual action." Fifteen months after the amended complaint had been filed and served, the government, without having answered, filed a motion to vacate the April 16, 1973, order or, in the alternative, to strike the class action portion of the amended complaint. On September 23, 1975, an order was entered denying the motion in its entirety (App. A, p. 1A).

Since 1955, Koerner has been a member of the West Virginia Department of Public Safety, commonly known as the State Police and hereinafter referred to as "Department." The Department was created by an act of the West Virginia Legislature during an extraordinary session thereof on March 29, 1919. It was the fourth state police organization to be created in the United States. Today the Department consists of four companies totaling a complement of 391 men under the command of a superintendent. The Department was and is still organized along traditional military concepts. The uniform of the members, military in design, is prescribed and provided for by law and must be worn according to military standards of dress. In addition, the members of the Department are required to observe certain rules of military courtesy, including the execution of a hand salute to the governor of the state, the superintendent of the Department and all commissioned officers thereof (App. A, p. 2A).

All members of the Department are subject to duty twenty-four hours a day every day and no member

may absent himself from duty except with an authorized leave of absence (App. A, p. 2A).

Since its inception, the Department members have been concerned with law enforcement duties in the territorial confines of the State of West Virginia, the Department having state-wide jurisdiction by law. These duties include, but are not limited to, the arrest of any and all persons anywhere in the confines of the state charged with a violation of any law of the state or the United States; service of criminal process anywhere within the state; the cooperation with local authorities with detecting crime; highway patrol and accident investigations, which duties are primarily performed outside the cities and towns which are protected by local police departments (App. A, pp. 2A-3A).

Members of the Department receive a statutorily-fixed salary. W. Va. Code 15-2-9. Subsistence payments are made to members of the Department in compliance with the provisions of Chapter 15, Article 2, Section 9, of the Code of West Virginia, as amended. Subsistence payments, however, are only received by members of the Department for days that a member is actually on duty. The salary and subsistence payments are made to the members of the Department by separate checks at the end of each month. These payments are not considered as income by the state of West Virginia in determining the retirement pay of the members and are not intended to represent additional compensation. During the year 1967 the rate of subsistence paid to a member of the Department was $5.50 per day. For the years 1968 and 1969 the rate was $5.75 per day (App. A, p. 3A).

The record shows that initially there were two company headquarters established, each with a barracks and a kitchen-mess which accommodated the officers

and men and provided them with food and rations, all as provided by law. As the Department grew in size, members were deployed singly and in groups to various sections of West Virginia to perform the duties imposed upon the Department, in which event they were quartered in buildings owned or leased by the state and there fed at a common mess as at the two company headquarters, or they were lodged in rooming houses and fed at restaurants or boarding houses with the cost thereof borne directly by the state in lieu of housing, quarters and meals (initially $1.00 per day), or the members were dealt with by any combination of these methods depending upon which method best suited the convenience of the state under the then prevailing circumstances. Today there is at least one detachment permanently located in each of the fifty-five counties of West Virginia. During this period of growth various changes occurred in the furnishing of subsistence to members by the state in addition to the methods above enumerated. In any event, all of these methods evolved into the present practice of the state paying cash directly to all members of the Department in lieu of housing, quarters and rations (App. A, pp. 3A-4A).

While on duty a member of the Department has a choice of locations where he may eat, but it should not be remote from his assigned area. While the Department has no regulation designating where a member must eat, no member must frequent any place which might reflect unfavorably upon himself or the Department (App. A, p. 4A). In addition, before leaving his patrol car a member must report his position to local headquarters so that he might be reached by public communications should he be needed (App. A, p. 4A).

ARGUMENT

In holding that cash subsistence payments made by the State of West Virginia to members of its Department of Public Safety are excludable from their gross income under Section 119 of The Internal Revenue Code of 1954, 26 U.S.C., the district Court stated ". . . That the record in this case conclusively shows that the meals for which a cash subsistence is paid were furnished on the business premises of the employer at the convenience of the employer." (App. A, p. 9A)

In reversing, The Fourth Circuit Court of Appeals aligned itself with The First Circuit (*Wilson* v. *United States*, 412 F. 2d 694) (App. C, p. 16A) and in opposition to The Third Circuit (*Saunders* v. *Commissioner of Internal Revenue*, 215 F. 2d 768; *Kowalski* v. *Commissioner*, 544 F. 2d 686), Fifth Circuit (*United States* v. *Barrett*, 321 F. 2d 911), Eighth Circuit (*United States* v. *Morelan*, 356 F. 2d 199) and Tenth Circuit (*United States* v. *Keeton*, 383 F. 2d 429). (App. C, pp. 16A-17A). The court of appeals tacitly found no fault with the district Court's finding that the payments involved were "for the benefit of the employer" but stated that "the plaintiffs while engaged in their duties concededly are not furnished meals 'on the business premises of the employer.' The payments made to them by the State of West Virginia cannot consequently meet the clearly stated requirements for exclusion from gross income under The Internal Revenue Code." Counsel is confused as to the use by the court of appeals of the work "concededly" because no such concessions were made and can only surmise that this word is used in connection with the fact that admittedly plaintiffs were not furnished "meals" at the various "barracks" or "headquarters."

The finding by the district court that these payments were for "the convenience of the employer" and the tacit approval thereof by the court of appeals is amply supported by the facts herein, and should remain unchanged.

The First Circuit in *Wilson* and The Fourth Circuit herein have taken a very narrow and restricted position on their interpretation of the meaning of "business premises of the employer" as used in Section 1.119 of The Treasury Regulations. Logically extended, this rule would restrict the business of the State of West Virginia in police work to the local "station houses" or "barracks". Inasmuch as the jurisdiction of the petitioners is statewide and their many duties include the investigation of accidents and the patrolling of highways (App. A, p. 3A) to so restrict the "business premises" of the State of West Virginia to isolated "station houses" or "barracks" is not realistic.

The petitioners urge this Court to adopt the more realistic position stated in the *Barrett* and *Morelan* decisions. In *Barrett*, the Court stated:

"The commissioner takes too narrow a view of what constitutes the business premises of the Mississippi Highway Patrol. The major business of this state law enforcement agency is obviously not confined to isolated station houses; rather it covers every road and highway in the state 24 hours a day every day. In view of the special nature and function of the highway trooper's work, it is unrealistic to treat the employers place of business as limited to the state patrol headquarters. This criterion, therefore, is not decisive against the excludability of the sums here in question."

And later in *Morelan*, citing with approval the district court language:

"The defendant's (government's) contention that the subsistence allowance is not excludable under Sec-

tion 119 because the meals were not consumed on the 'business premises of the employer', while theoretically arguable, doesn't make much sense because the 'business premises' of the State of Minnesota extend over all of the state and particularly to the highways of the state where these plaintiffs worked."

In *Keeton*, the Tenth Circuit summarily agreed with the reasoning of *Barrett* and *Morelan* and in 1976, the Third Circuit, in *Kowalski*, adhered to its reasoning in *Saunders* and *Jacobs* and aligned with *Barrett*, *Moreland* and *Keeton*.

Under the facts of this case and the rulings and reasoning in *Saunders*, *Barrett*, *Morelan*, *Keeton* and *Kowalski* it is evident that the district court was correct in holding that the cash subsistence paid to the petitioners was (1) on the business premises of the employer and (2) for the convenience of the employer and that the reversal thereof by the Court below calls for a review by this Court.

2. The original complaint was filed only on behalf of Koerner and his wife, to which the government filed a timely answer. On April 16, 1973, the late Sidney L. Christie, Judge of this Court, entered an order permitting the Koerners to amend the complaint "so as to make this a class action as well as an individual action." Fifteen months after the amended complaint had been filed and served, the government, without having answered, filed a motion to vacate the April 16, 1973, order or, in the alternative, to strike the class action portion of the amended complaint. On September 23, 1975, an order was entered denying the motion in its entirety. (App. A, p. 1A).

On appeal, the United States claimed error in permitting this action to proceed as a class action. The Court of Appeals, in a footnote to its opinion, agreed

with the respondent's position but did not resolve this claim of error as being unnecessary. (App. C, p. 15A). In the event that this Court should reverse the Court of Appeals and uphold the district court, the class action question should be answered.

The plaintiffs meet the requirements of paragraph (a) of Rule 23 in that:

1. There are in excess of 400 members of the West Virginia Department of Public Safety making a class action the only feasable method of disposing of all of their claims.

2. Every question of law and every important question of fact is common to every member of the class.

3. The claims of the Koerners is typical of every member of the class.

4. The Koerners will fairly and adequately protect the interests of the class, and have done so to this point, and

5. Separate actions by each of the class would create a risk of inconsistent or varying adjudications and establish incompatible standards of conduct. The members of this class live in all of the Federal Districts of the State of West Virginia and possible divergent results would cause some members to pay income taxes on their subsistence payments while other members would be excused therefrom.

The United States took the position below that Judge Cristie should have determined under what Section of Rule 23 he allowed the class action but Judge Christie did enter an Order allowing a class action and we must assume that this was done only after he was of the opinion that all requirements had been met.

The judgment order (App. B, pp. 12A-13A) included and designated those whom the Court found to

be members of the class under Section (c) (3) and it is apparent that the Court did not deem it necessary to make any additional orders provided from under Section (d).

The respondent was furnished the names and Social Security Numbers of all of the members of the class herein in plaintiffs Answer to Interrogatories filed on May 27, 1975. The respondent can raise any individual objections concerning the amount of refund any member may be entitled to receive and the Judgment Order provides that only those members of the class who have filed timely refund claims are entitled to any refund under any circumstances. If the judgment of the district court is permitted to stand, the determination of the amount due to each member of the class would be a simple matter of the addition and subtraction of figures already in the possession of the Respondent, applying the findings of said judgment thereto.

The respondent objected to the fact that it did not receive notice of the petitioner's motion to amend the original complaint to convert to a class action, which notice it did not, in fact, receive. However, said amended complaint and order allowing the same were filed on April 16, 1973, and the respondent received proper copies of each. No objection was raised to this procedure until July 19, 1974, some 15 months and three days later, and on November 21, 1975, an answer was filed to said amended complaint. (App. A, p. 1A). The petitioner contends that such procrastination constituted a waiver of any defect in the procedures followed. In *Arp* v. *United States*, 244 F. 2d 571 (1957), the Tenth Circuit ruled that a defendant in a condemnation proceding, by failing to object to the fact that a supplemental petition was filed without notice of application therefore, waived any procedural

irregularity out of the failure to give notice. The granting of leave to amend is discretionary and should not be disturbed on appeal unless grossly abused. The respondent was not prejudiced by the actions of the district court in this regard and its action should stand.

The rejection by the court of appeals of the plain meaning of Section 119 and Section 1.119-1 as herein discussed as well as its footnote on class actions calls for a review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April, 1977

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON

MORGAN P. KOERNER AND JUANITA B. KOERNER, who sue individually and as class representatives of all members of the West Virginia Department of Public Safety and their spouses,

Plaintiffs,

Vs. CIVIL ACTION NO. 2847-HN,

UNITED STATES OF AMERICA,

Defendant.

OPINION

KNAPP, DISTRICT JUDGE

Plaintiffs, Morgan P. Koerner and Juanita B. Koerner,[1] his wife, and the class they represent, bring this action pursuant to 28 U.S.C. § 1346(a) (1), to recover federal income taxes and assessed interest for the years 1967, 1968 and 1969.[2]

[1] Juanita B. Koerner is a party to this action solely as a result of the filing of joint income tax returns for the years in issue.

[2] The original complaint was filed only on behalf of Koerner and his wife, to which the government filed a timely answer. On April 16, 1973, the late Sidney L. Christie, Judge of this Court, entered an order permitting the Koerners to amend the complaint "so as to make this a class action as well as an individual action." Fifteen months after the amended complaint had been filed and served, the government, without having answered, filed a motion to vacate the April 16, 1973 order or, in the alternative, to strike the class action portion of the amended complaint. On September 23, 1975, an order was entered denying the motion in its entirety.

This case is presently before this Court on respective motions for summary judgment filed by each of the parties to this action. The main issue to be determined is whether cash subsistence payments paid to Morgan P. Koerner are excludable from his gross income under the provisions of § 119, Internal Revenue Code of 1954, 26 U.S.C. § 119.[3]

Since 1955 Koerner has been a member of the West Virginia Department of Public Safety, commonly known as the State Police and hereinafter referred to as "Department." The Department was created by an act of the West Virginia Legislature during an extraordinary session thereof on March 29, 1919. It was the fourth state police organization to be created in the United States. Today the Department consists of four companies totaling a complement of 391 men under the command of a superintendent. The Department was and is still organized along traditional military concepts. The uniform of the members, military in design, is prescribed and provided for by law and must be worn according to military standards of dress. In addition, the members of the Department are required to observe certain rules of military courtesy, including the execution of a hand salute to the governor of the state, the superintendent of the Department and all commissioned officers thereof.

All members of the Department are subject to duty twenty-four hours a day every day and no member may absent himself from duty except with an authorized leave of absence.

Since its inception, the Department members have been concerned with law enforcement duties in the territorial confines of the State of West Virginia, the

[3] There is no doubt that the main issue in dispute is common to and affects all members of the class the Koerners represent.

Department having state-wide jurisdiction by law. These duties include, but are not limited to, the arrest of any and all persons anywhere in the confines of the state charged with a violation of any law of the state or the United States; service of criminal process anywhere within the state; the cooperation with local authorities with detecting crime; highway patrol and accident investigations, which duties are primarily performed outside the cities and towns which are protected by local police departments.

Members of the Department receive a statutorily-fixed salary. W. Va. Code 15-2-9. Subsistence payments are made to members of the Department in compliance with the provisions of Chapter 15, Article 2, Section 9, of the Code of West Virginia, as amended. Subsistence payments, however, are only received by members of the Department for days that a member is actually on duty. The salary and subsistence payments are made to the members of the Department by separate checks at the end of each month. These payments are not considered as income by the state of West Virginia in determining the retirement pay of the members and are not intended to represent additional compensation. During the year 1967 the rate of subsistence paid to a member of the Department was $5.50 per day. For the years 1968 and 1969 the rate was $5.75 per day.

The record shows that initially there were two company headquarters established, each with a barracks and a kitchen-mess which accommodated the officers and men and provided them with food and rations, all as provided by law. As the Department grew in size, members were deployed singly and in groups to various sections of West Virginia to perform the duties imposed upon the Department in which event they were

quartered in buildings owned or leased by the state and there fed at a common mess as at the two company headquarters, or they were lodged in rooming houses and fed at restaurants or boarding houses with the cost thereof borne directly by the state in lieu of housing, quarters and meals (initially $1.00 per day), or the members were dealt with by any combination of these methods depending upon which method best suited the convenience of the state under the then prevailing circumstances. Today there is at least one detachment permanently located in each of the fifty-five counties of West Virginia. During this period of growth, various changes occurred in the furnishing of subsistence to members by the state in addition to the methods above enumerated. In any event, all of these methods evolved into the present practice of the state paying cash directly to all members of the Department in lieu of housing, quarters and rations.

While on duty a member of the Department has a choice of locations where he may eat, but it should not be remote from his assigned area. While the Department has no regulation designating where a member must eat, no member must frequent any place which might reflect unfavorably upon himself or the Department. In addition, before leaving his patrol car a member must report his position to local headquarters so that he might be reached by public communications should he be needed.

With regard to the aforestated main issue in this case, the government contends that the cash subsistence payments do not qualify under § 119, Internal Revenue Code of 1954[4] because they neither constitute

[4] SEC. 119. MEALS OR LODGING FURNISHED FOR THE CONVENIENCE OF THE EMPLOYER.

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his

meals furnished in kind nor meet the requirement that the meals be furnished on the business premises of the employer. (Defendant's brief, p. 5).

These contentions have been answered adversely to the government in the cases of *United States v. Barrett*, 321 F. 2d 911 (5th Cir. 1963); *United States v. Morelan*, 356 F. 2d 199 (8th Cir. 1966); *United States v. Keeton*, 383 F. 2d 429 (10th Cir. 1967), all of which cases are not meaningfully distinguishable from the instant case. See also *Smith v. United States*, 75-1 U. S.T.C. par. 9184 (N.D. Miss. 1974).

With respect to the "in kind" requirement, the Court in Barrett,[5] supra, stated that "we cannot agree that the meals furnished must invariably be in kind." It went on to cite the case of *Saunders v. Commissioner*, 215 F. 2d 768 (3rd Cir. 1954), wherein that Court stated at p. 771:

> ". . . [T]he rationale of the rule should make it applicable to determine the extent of gross income either when quarters and meals are furnished in kind or cash is paid in lieu thereof . . . Admittedly, the payment of cash to an employee is normally compensatory and probably more obviously so than payment in kind. Nevertheless, just as an employee is often furnished tangible property which cannot be regarded as compensation, an employee may be furnished cash which is not compensation . . . ."

employer for the convenience of the employer, but only if —
(1) in the case of meals, the meals are furnished on the business premises of the employer, or
(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

[5] In its brief, the government politely criticizes the *Barret* court in relying on *Saunders* to conclude that it was not necessary for meals to be furnished in kind on the ground that *Saunders* was decided prior to § 119 being added to the Internal Revenue Code. The government would therefore distinguish *Saunders* but such would be without a distinction with respect to the reasoning advanced by *Saunders* regarding the "in kind" requirement. See *Jacob v. U.S.*, 493 F. 2d 1294, 1297 n. 6 (3rd Cir. 1974).

The Court in *Jacob v. United States*, 493 F. 2d 1294 (3rd Cir. 1974), appears to have approved the holdings in *Barrett, Morelan and Keeton*. In Jacob the issue was whether groceries furnished to the tax payer constituted "meals" within the meaning of § 119. The Court held in the affirmative notwithstanding the government's argument (which was identical to that advanced here) that "meals" under § 119 mean "prepared portions of food, such as those served in a restaurant." Id. In rejecting this argument, the Court instead gave the term "meals" a broad interpretation "in order to give effect to the basic purpose and spirit of § 119" as did the courts in *Barrett, Morelan* and *Keeton*. Id.

As to the government's contention that § 119 does not apply in this case because the meals are not furnished on the business premises of the employer, the following is a quotation of a district court's opinion in *Morelan v. United States*, 237 F. Supp. 879, 884 (D. Minn. 1965), aff'd 356 F. 2d 199 (8th Cir. 1966):

> "The defendant's (Government's) contention that the subsistence allowance is not excludable under § 119 because the meals were not consumed 'on the business premises of the employer,' while theoretically arguable, doesn't make much sense because the 'business premises' of the State of Minnesota extend over all of the State, particularly to the highways of the State where these plaintiffs worked . . . ."

Further, the Court in *Barrett*, supra, stated at page 912:

> "The Commissioner takes too narrow a view of what constitutes the 'business premises' of the Mississippi Highway Patrol. The major 'business' of this state law enforcement agency is obviously not confined to isolated station houses; rather, it covers every road and highway in the state twenty-four hours a day every day. In view of the special nature and function of the highway trooper's work, it is unrealistic to treat the employer's place of business as limited to the state patrol headquarters. This criterion, therefore, is not decisive against the excludability of the sums here in question."

This Court firmly believes that the reasoning in these two statements is unassailable. To interpret "business premises" otherwise would lead to absurd results under the facts in this case and the other "state police" cases. See *Commissioner v. Brown*, 380, U.S. 563 (1965). The government's position based upon *Wilson v. United States*, 412 F. 2d 694 (1st Cir. 1969), is illogical and is not supported by the facts in this case.[6] Further, the Court in *Wilson*, supra, made no mention as to the importance, or lack thereof, of determining whether or not the meals are furnished for the convenience of the

[6] The Court is aware of the recent tax court case of *Kowalski* v. Commissioner, CCH Dec. 33,458 (Oct. 1975) wherein the Tax Court (six members dissenting) held under facts similar to those of this case that meal allowance advanced to a New Jersey State trooper were not "meals furnished in kind" under § 119. This case was decided in the jurisdiction of the Third Circuit Court of Appeals, but seems to be in conflict with *Jacob* on the "meals in kind" question. The majority opinion emphasized that *Jacob* was not controlling because of the factual differences between the two cases and that *Saunders* was not controlling because it was decided prior to 1954. However, as a practical matter these "distinguishing features" are meaningless in determining what constitutes "meals in kind."

employer. The convenience of the employer test has been held to be the key criteria in determing whether an employee is entitled to an exclusion under § 119. *Jacob v. United States*, supra, at page 1297. The Court stated in Barrett, supra, at page 913:

> "[T]he sums in question were in addition to the trooper's fixed statutory compensation. The patrolmen were required to eat meals along their regular routes so that the patrol areas would not be unguarded during mealtime, and they were required to notify their headquarters where they were eating so that they could be reached in case of an emergency. The sums paid the patrolmen so that they could eat at restaurants on their tour of duty were thus primarily for their employer's benefit. . . ."

Moreover, in Treasury Regulations, § 1.119-1[7] it is stated that the "question of whether meals are furnished for the convenience of the employer *is one of fact to be determined by analysis of all the facts and circumstances in each case.*" (Emphasis supplied). The Regulation also states that if it is shown that meals are furnished on the business premises of the employer

[7] Treasury Regulations on Income Tax (1954 Code) (26 C. F. R.):
& 1.119-1 *Meals and lodging furnished for the convenience of the employer.*

(a) Meals—(1) In general. The value of meals furnished to an employee by his employer shall be excluded from the employee's gross income if two tests are met: (i) The meals are furnished on the business premises of the employer, and (ii) the meals are furnished for the convenience of the employer. The question of whether meals are furnished for the convenience of the employer is one of fact to be determined by analysis of all the facts and circumstances in each case. If the tests described in subdivisions (i) and (ii) of this subparagraph are met, the exclusion shall apply irrespective of whether under an employment contract or a statute fixing the terms of employment such meals are furnished as compensation.

and that the meals are furnished for the convenience of the employer, the exclusion of payments received shall apply.[8] This Court believes, and so holds, that the record in this case conclusively shows that the meals for which a cash subsistence is paid were furnished on the business premises of the employer at the convenience of the employer.

The government also urges that the repeal of § 120 of the Internal Revenue Code,[9] which was contemporaneously enacted with § 119 in 1954, conclusively shows that Congress did not intend that § 119 should apply to cash subsistence payments made to state policemen. This Court cannot agree. Rather it is the belief of this Court that the repeal of § 120 would only preclude a court from holding that cash subsistence payments are, as a matter of law, excluded, but it would not preclude a court from holding that such cash payments would be excluded as a matter of fact. Treasury Regulation 1.119-1(a) (1).

Finally, the government contends that the plaintiff cannot maintain this action with respect to the year 1968 because he failed to comply with the statutory requirement of filing a claim for refund for that year. Section 7422, Internal Revenue Code of 1954, 26

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[8] In its brief the government does not really attack the plaintiffs' contention that the "convenience of the employer" test is met under the facts of this case.

[9] SEC. 120. STATUTORY SUBSISTENCE ALLOWANCE RECEIVED BY POLICE.

(a) *General Rule.* — Gross income does not include any amount received as a statutory subsistence allowance by an individual who is employed as a police official by a State, a Territory, or a possession of the United States, by any political subdivision of any of the foregoing, or by the District of Columbia.

(b) Limitations. —

(1) Amounts to which subsection (a) applies shall not exceed $5 per day.

U.S.C. § 7422.[10] The record, however, discloses otherwise. The government admits in its brief that the plaintiff timely filed a joint tax return for the year 1968 in which the subsistence payments received for that year were treated as income. The government further admits that a claim for refund was filed on October 15, 1970. On November 20, 1970, plaintiff was refunded $260.80 which represented the amount of taxes he paid and the interest thereon for the year 1968. The government then states in its brief that "the Commissioner, however, discovered this error [the refund of $260.80] and on February 14, 1972, the plaintiff was timely assessed $256.96 in taxes and interest." Four days later plaintiffs satisfied in full this amount. (Defendant's brief, p. 21).

Section 7422 states that no suit may be maintained in any court for the recovery of any internal revenue tax alleged to have been assessed or collected until a claim for refund or credit has been duly filed with the secretary or his delegate. The record firmly establishes that the plaintiff did, in fact, file such a claim for refund prior to the institution of this action. The government readily admits that the commissioner merely made an error when he sent the refund check to the plaintiff on November 20, 1970. From the record in this action, it is apparent that such error was

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[10] SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) No Suit Prior to Filing Claim for Refund. — No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected,or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

an administrative error and did not constitute acquiescence on the part of the commissioner when the refund for 1968 was made to plaintiff. This conclusion is further supported by the fact that the record shows that at the time the plaintiff filed a claim for refund on October 15, 1970, for the year 1968, he also filed like claims for the years 1967 and 1969, which claims were denied.

This Court would therefore hold that the plaintiff is not precluded from bringing this action with respect to the year 1968.

ORDER

Accordingly, it is ORDERED that plaintiff's motion for summary judgment be and the same is hereby granted and that defendant's like motion be and the same is hereby denied.

The Clerk is directed to mail certified copies of this Memorandum and Order to all counsel of record.

ENTER: December 17, 1975

/S/ DENNIS R. KNAPP
DENNIS R. KNAPP
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON

MORGAN P. KOERNER AND JUANITA B. KOERNER, who sue individually and as class representatives of all members of the West Virginia Department of Public Safety and their spouses,

Plaintiffs,

Vs. CIVIL ACTION NO. 2847-HN,
[Filed January 19, 1976]

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT ORDER

This action came on for hearing before the Court, and the issues having been duly rendered as reflected in the written opinion of this Court of December 17, 1975 which is hereby ordered filed and made a part of the record herein.

It is ORDERED and ADJUDGED:

(1) That Morgan P. Koerner and Juanita B. Koerner recover from the defendant the sum of $243.42, which sum represents income taxes paid by them for the year 1967, together with interest thereon from the date of payment.

(2) That Morgan P. Koerner and Juanita B. Koerner recover from the defendant the sum of $256.96, which sum represents income taxes paid by them for the year 1968, together with interest thereon from the date of payment.

(3) That Morgan P. Koerner and Juanita B. Koerner recover from the defendant the sum of $265.05, which sum represents income taxes paid by them for the year 1969, together with interest thereon from the date of payment.

(4) That Morgan P. Koerner and Juanita B. Koerner recover from the defendants, with interest from the date of payment, all such other income taxes paid by them which had been levied on subsistence payments received by them as a member of the West Virginia Department of Public Safety, provided, however, that they have made timely application for a refund as provided by law.

(5) That each and every other member of the West Virginia Department of Public Safety recover from the defendant, with interest from the date of payment, income taxes paid by them which had been levied on the subsistence payments received by them as a member of the West Virginia Department of Public Safety, commencing with the year 1967 and for the years subsequent thereto, but only in the event and to the extent that such members of the class involved in this action have made timely application for a refund thereof as provided by law.

It is further ORDERED that this action be dismissed from the docket of this Court.

The Clerk is directed to forward certified copies of this order to all counsel of record.

ENTER: January 19, 1976

/S/ DENNIS R. KNAPP
DENNIS R. KNAPP
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 76-1495

MORGAN P. KOERNER AND JUANITA B. KOERNER, who individually and as Class Representatives of all members of the West Virginia Department of Public Safety, and their spouses,

Appellees,

— versus —

UNITED STATES OF AMERICA,

Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington. Dennis R. Knapp, District Judge

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Argued: December 9, 1976. Decided: February 28, 1977.

Before CRAVEN, RUSSELL and WIDENER, Circuit Judges.

William A. Friedlander, Attorney, Tax Division, Department of Justice (Scott P. Crampton, Assistant Attorney General, John A. Field, III, United States Attorney, Raymond L. Hampton, II, Assistant United States Attorney Gilbert E. Andrews and Alfred S.

Lombardi, Attorneys, Tax Division, Department of Justice on brief) for Appellant; Edward V. Lee for Appellees.

PER CURIAM:

Plaintiffs are members of the West Virginia Department of Public Safety, commonly known as State police. Under West Virginia law, they are provided a subsistence allowance for each working day, in lieu of housing, quarters and rations.[1] On the joint returns filed for the years 1967, 1968 and 1969, plaintiffs included these payments in their gross income, but subsequently filed amended returns for the years in issue, claiming an overpayment in taxes for each year based upon their erroneous treatment of the subsistence payments as income. The Commissioner of Internal Revenue denied the claims for refunds on the ground that such payments were income and not excludable.[2] Thereafter, plaintiffs filed this refund action.[3] The District Court entered judgment in favor of the plaintiffs and the United States appealed. We reverse.

It is settled that deductions from income for federal tax purposes exist only as specifically authorized by

[1]After suit was filed, plaintiffs were allowed, without notice to the United States, through amendment of their complaint, to proceed both individually and as representatives of a class consisting of all the members of the State police in West Virginia. The United States claims error in allowing the action to proceed as a class action. We are inclined to agree with such contention, *see, Lipsett v. United States* (S.D.N.Y. 1965) 37 F.R.D. 549, 552, *aff'd.* 359 F. 2d 956, but, since we find that the claims of the plaintiffs are without merit, it is unnecessary to resolve this claim of error.

[2]Plaintiffs were denied a refund only for 1967 and 1969; the Commissioner inadvertently refunded the amount claimed for 1968.

[3]28 U.S.C. § 1346 (a) (1).

statute;[4] and statutes authorizing such deductions are to be strictly construed.[5] The right to exclude from gross income "the value of any meals or lodging to [an employee] by his employer for the convenience of the employer" is specifically limited by the Internal Revenue Code to meals "furnished on the business premises of the employer."[6] The phrase "furnished on the business premises of the employer" is neither vague nor indefinite; it is, as the Court said in *Wilson v. United States* (1st Cir. 1969) 412 F. 2d 694 at 696, a phrase of great specificity." The plaintiffs while engaged in their duties concedely are not furnished meals "on the business premises of the employer." The payments made to them by the State of West Virginia cannot consequently meet the clearly stated requirements for exclusion from gross income under the Internal Revenue Code. The District Court should, therefore, have entered judgment for the United States.

We realize that in directing judgment for the United States, we are going against decisions in the Third,[7] Fifth[8], Eighth[9] and Tenth Circuits[10], but, like the First Circuit[11], we cannot read the plainly stated language of § 119 as authorizing the exclusion of these payments

[4]*Commissioner v. Jacobson* (1940) 336 U. S. 28, 49; *Helvering v. Northwest Steel Mills* (1940) 311 U. S. 46, 49.

[5]*Bingler v. Johnson* (1969) 394 U. S. 741, 751-2; *Trustees of Graceland Cem. Imp. F. v. United States* (Ct. Claims 1975) 515 F. 2d 763, 770.

[6]§ 119, 26 U.S.C.

[7]*Kowalski v. Commissioner* (3rd Cir. 1976) ____F. 2d ____; *Jacob v. United States* (3d Cir. 1974) 493 F. 2d 1294; *Saunders v. Commissioner of Internal Revenue* (3d Cir. 1954) 215 F. 2d 768.

[8]*United States v. Barrett* (5th Cir. 1963) 321 F. 2d 911.

[9]*United States v. Morelan* (8th Cir. 1966) 356 F. 2d 199.

[10]*United States v. Keeton* (10th Cir. 1967) 383 F. 2d 429.

[11]*Wilson v. United States*, supra, 412 F. 2d at 696.

to the plaintiffs for "meals" from gross income. It may seem unfair to make the distinction between meals "furnished * * * on the business premises of the employer" and those provided elsewhere, but deductions from income depend entirely on legislature grace and not on principles of absolute fairness.[12] Actually, it is unlikely that a completely fair system of taxation could be formulated.

The judgment of the District Court is reversed and the cause is remanded for the entry of judgment in favor of the United States.

REVERSED

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[12]*Commissioner v. Sullivan* (1958) 356 U. S. 27, 28; *Harper v. United States* (D.S.C. 1967(274 F. Supp. 809, 813, *aff'd.* 396 F. 2d 223; *Harper Oil Company v. United States* (10th Cir. 1970) 425 F. 2d 1335, 1342.

APPENDIX D

Internal Revenue Code of 1954 (26 U.S.C.):

Sec. 119 Meals or Lodging Furnished For the Convenience of the Employer

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if:

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.)

Sec. 1.119-1 Meals and lodging furnished for the convenience of the employer

(a) Meals — (1) In general. The value of meals furnished to an employee by his employer shall be excluded from the employee's gross income if two tests are met: (i) The meals are furnished on the business premises of the employer, and (ii) the meals are furnished for the convenience of the employer. The question of whether meals are furnished for the convenience of the employer is one of fact to be determined by analysis of all the facts and circumstances in each case. If the tests described in subdivisions (i) and (ii) of this subparagraph are met, the exclusion shall apply

irrespective of whether under an employment contract or a statute fixing the terms of employment such meals are furnished as compensation.

(ii) (a) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours to have the employee available for emergency call during his meal period. In order to demonstrate that meals are furnished to the employee to have the employee available for emergency call during the meal period, it must be shown that emergencies have actually occurred, or can reasonably be expected to occur in the employer's business which have resulted, or will result, in the employer calling on the employee to perform his job during his meal period.

(c) Rules. (1) For purposes of this section, the term "business premises of the employer" generally means the place of employment of the employee. For example, meals and lodging furnished in the employer's home to a domestic servant would constitute meals and lodging furnished on the business premises of the employer. Similarly, meals furnished to cowhands while herding their employer's cattle on leased land would be regarded as furnished on the business premises of the employer.

APPENDIX E

Rule 23

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the Class is so numerous that joinder of all members is impractible, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Action Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or . . . .

(c) *Determination by Order Whether Class Action to Be Maintained: Notice: Judgment: Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the Court shall determine by order whether it is to be so maintained . . . . .

(3) The judgment in an action maintained as a class action under subdivision (b) (c) or (2), whether or not favorable to the class, shall include and describe

those whom the Court finds to be members of the class . . . .

(d) *Orders In Conduct of Actions.* In the conduct of actions to which this rule applies, the Court may make appropriate orders: . . . .